

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JANET JENKINS, et al.,

Plaintiffs,

v.

KENNETH L. MILLER, et al.,

Defendants.

Case No. 18-mc-80213-TSH

ORDER COMPELLING PRODUCTION

Re: Dkt. No. 1

This motion to compel compliance with a subpoena arises out of an underlying action pending in the District of Vermont, *Jenkins v. Miller*, No. 2:12-cv-184 (D. Vt.). Plaintiff Janet Jenkins alleges that she entered into a civil union with Lisa Miller in Vermont and Isabella Miller-Jenkins is their daughter. When Isabella was 17 months old, Miller moved with Isabella to Virginia and petitioned the Vermont family court to dissolve the union. Around the same time, Miller converted to fundamental Christianity and asserted her new-found belief that homosexuality is sinful and that her daughter should be shielded from it. The complaint alleges that following dissolution of the civil union, custody over Isabella was initially joint but that Miller interfered with Jenkins' lawful entitlement to see Isabella. Since January 1, 2010, Jenkins has had sole legal custody of Isabella. However, Jenkins has not seen her daughter in 10 years because in September 2009, Miller kidnapped Isabella and took her to Nicaragua, where the two had been living in hiding among the Beachy Amish-Mennonite Community. Jenkins alleges there were a number of co-conspirators in the kidnapping, including Miller's lawyers, the law firm Liberty Counsel.

According to Jenkins' counsel's declaration, Liberty Counsel posts an array of information on its various websites, including information about its cases and legal positions. J. Tyler

1 Clemons Decl., ¶ 2, ECF No. 3. He states that Liberty Counsel frequently posted on its websites
2 regarding its involvement in the custody battle between Jenkins and Miller and regarding the
3 underlying lawsuit. *Id.* ¶ 3. In June 2018, a researcher at the Southern Poverty Law Center, which
4 represents Jenkins, noticed that Liberty Counsel’s websites had been removed from the Internet
5 Archive’s Wayback Machine. *Id.* ¶ 5.

6 By way of background, the Internet Archive is a nonprofit organization seeking to build a
7 digital library of the Internet by creating and maintaining an archive of all websites in their current
8 and past forms. See <https://archive.org/about/>. As part of this mission, the Internet Archive
9 operates the “Wayback Machine,” a search engine-like service that allows members of the public
10 to visit archived versions of websites. See
11 https://archive.org/about/faqs.php#The_Wayback_Machine.

12 Jenkins served the subpoena at issue on the Internet Archive. Request 1 seeks “[a]ll
13 websites made available by Liberty Counsel, including all documents concerning the domains
14 <http://www.lc.org> and <http://www.libertycounsel.com>.” During meet and confer, the Internet
15 Archive represented that it could not access the archived copies of Liberty Counsel’s websites
16 without restoring them to the Wayback Machine, thereby making them publicly accessible.
17 Clemons Decl., ¶ 8. It also stated that its policy is not restore removed websites to the Wayback
18 Machine without permission from the party that requested removal or a court order. *Id.* The
19 restoration can be temporary, and once the documents are produced, the archives can again be
20 excluded from the Wayback Machine in the normal manner. ECF No. 2, Ex. 4.

21 Jenkins now brings this motion to compel compliance with Request 1 of the subpoena.
22 Jenkins filed the motion on December 17, 2018, and the certificate of service states that on
23 December 14, 2018, it was served on Liberty Counsel and other Defendants in the underlying
24 lawsuit and on the Internet Archive. ECF No. 1. The deadline to oppose the motion has long
25 since passed, see Local Rule 7-3(a), and no opposition has been filed.

26 The Court **GRANTS** Jenkins’ motion. The archived copies of Liberty Counsel’s websites
27 can be expected to contain statements about issues central to the underlying lawsuit, such as
28 references to the custody battle between Miller and Jenkins. The archived websites may also

1 contain evidence of Liberty Counsel's animus toward LGBT people, which is an element of
2 Jenkins' second claim for relief under 42 U.S.C. § 1985(3). Request 1 of the subpoena does not
3 appear to be burdensome for the Internet Archive to comply with. Liberty Counsel has not
4 opposed the motion to compel or provided any explanation how the temporary public access to the
5 archived websites necessary to effectuate their production would cause undue prejudice to its
6 intellectual property rights in that content. Accordingly, the Court **ORDERS** the Internet Archive
7 to produce documents responsive to Request 1 of the subpoena to Jenkins within 30 days. The
8 Court also **ORDERS** Jenkins to serve this order on the Internet Archive and Defendants in the
9 underlying action promptly.

10 **IT IS SO ORDERED.**

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12 Dated: January 14, 2019

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15 THOMAS S. HIXSON
16 United States Magistrate Judge
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